**IN THE HIGH COURT OF BOMBAY AT GOA**

**SECOND APPEAL NO.80 OF 2000**

1. Shri Shankar Rama Gaude,
   son of Rama Shankar Gaude,
   major age, service,
   and his wife;

2. Smt. Madhavi Shankar Gaude,
   major, housewife;

3. Shri Krishna Rama Gaude,
   son of Rama Shankar Gaude,
   Agriculturist, (expired),
   through his heirs at
   Sr. No.4a to 4c;

4. Smt. Laxmi Krishna Gaude,
   major age, housewife;

   a) Kum. Sarits Krishna Gaude,
      daughter of deceased,
      aged 10 years;

   b) Master Sachin Krishna Gaude,
      son of deceased, aged 8 years;

   c) Kum. Priya Krishn Gaude,
      daughter of deceased,
      aged 6 years;

      All residing at Devau Tuem,Pernem.

5. Gopal Rama Gaude,
   son of Rama Shankar Gaude,
   unmarried, Agriculturist;

6. Devidas Rama Gaude,
   son of Rama Shankar Gaude,
   major age, Agriculturist;

7. Miss Suda Rama Gaude,
daughter of Rama Shankar Gaude,
housework;

All residing at Dulwada, Tuem,
Pernem, Goa.

8. Smt. Yeshashri Mohan Bandekar,
daughter of Rama Shankar Gaude,
housewife and her husband;

9. Mohan Bandekar,
major, agriculturist,

Both resident of Langarbag, Torxedm
Pernem, Goa.

10. Mrs. Vilashini Ganpat Parab,
daughter ofRama Shankar Gaude,
major, married, housewife
and her husband;

11. Shri Ganpat Parab
major, agriculturist,

Both resident of Varkhand,
Pernem, Goa.

12.Mrs. Anusaya Bhikaji Parab,
major, housewife, and her husband.

13.Shri Bikaji Babu Parab,
major agriculturist,
Both residents of Deulwado,
Tuem, Pernem, Goa. ...Appellants

V e r s u s

Devastan of Shri Bhagwati of Tuem,
represented by its attorney
Shri Rohidas Chandroji Naik
son of Ghadroji Naik, major age,
married, employed, residing at
Gaonkarwada, Tuem, Pernem, Goa. ...Respondent.

Shri M.S. Usgaonkar, Advocate for the appellants.

Shri P.S. Rao, Advocate for the respondent.

**CORAM : N. A. BRITTO,J**

**DATE : 21ST OCTOBER, 2005**

**ORAL JUDGMENT:**

This is plaintiffs' second appeal arising from Regular Civil Suit No.9/96.

2. The dispute between the plaintiffs and the defendant is regarding the property surveyed under no.263/3 of village Tuem in which admittedly there is a house belonging to the plaintiffs and a temple of Sri Sateri belonging to the defendant. There is no dispute that the property surveyed under no.263/1 belongs to the defendant wherein the main temple of Sri Bhagwati is located and so also other affiliate temples of Sri Mahadeo, Sri Vishnu and a Dharmashala belonging to the defendant.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

4. The case of the plaintiffs, in brief, is that the said property was known as 'Deusu' or 'Deulacodil Sorvo Gorbatulem Gaudo' and that the same was their ancestral property having Land Registration No.18644 and Inscription No.13443 and that the plaintiffs were regularly paying land tax in respect of the same. The boundaries of the said property have been set out in para 3 of the plaint regarding which there is now no dispute raised. The plaintiffs stated that the said property was inscribed and described in the name of Gopal Nango Gaudo, Xencora Nango Gaudo and Krishna Nango Gaudo who are the ancestors of the plaintiffs and that there was a house in the said property which was jointly possessed and enjoyed by them for more than 100 years as co-owners thereof and that in the suit property, on its South-eastern corner there was a coconut garden where there were trees planted by them and enjoyed by them and that they irrigated the same by drawing water from the lake(tank) which exists by the side of the coconut garden. The plaintiffs stated that on the North-west corner there was a small temple which was initially constructed by the ancestors of the plaintiffs and the right of performing daily puja was with the plaintiffs and the right to take the offerings made to the deity was with the

plaintiffs. The plaintiffs admitted that the suit property was surveyed in the name of the defendant but stated that they came to know about the same only about two years back and that thereafter they represented to the defendant who assured them that they would give no objection but subsequently avoided to give the same. It was the case of the plaintiffs that they possessed and enjoyed the said property till 30.3.1994 when during the celebrations of Holi the members of the defendant's Committee accompanied by others forcibly and unauthorisedly entered the suit property and destroyed the fencing erected by the plaintiffs to protect the plantation and tried to pluck coconuts. The plaintiffs stated that the said property was quite distinct and separate from the suit property and on its Northern side it is separated by a stone wall and surveyed under no.263/1 and that the defendant had no right whatsoever to interfere with the said property. The plaintiffs therefore filed a suit seeking a declaration that the plaintiffs were the owners of the said property and for perpetual injunction to restrain the defendant from interfering with their possession and also for a declaration that the entry of the defendant in occupants column of Form No. I & XIV was erroneous.

5. It was the case of the defendant that the suit property belonged to the temple of Sri Bhagwati and it was listed in the assets of the temple in the Official Gazette dated 1.9.1955 and that the inscription and description given by the plaintiffs was based on the Partition Deed which was an unilateral act of the parties which did not create any right in favour of the plaintiffs. The defendant stated that the plaintiffs had not produced any title document to substantiate their claim and that the plaintiffs also did not pay any land tax in respect of the property and the property belonged to the temple and its Committee was in physical possession of the same. The defendant admitted that the house of the plaintiffs was situated in the said property and although the defendant stated that the well belongs to them, they stated that they had not objected the plaintiffs taking water from the said well. The defendant further stated that the plaintiffs did not plant any coconut trees as claimed by them and that there was only one cattle shed belonging to the plaintiffs and the second structure was constructed by the Committee in the year 1992 which was used for keeping the material belonging to the temple. The defendant sated that the family of the plaintiffs was allowed to perform puja in the said temple of Sri Sateri and remuneration was paid to them till recently and that

at present the plaintiffs were not performing the puja in the said temple and the family of the plaintiffs had no right to perform the same. The defendant stated that the suit property belonged to the defendant – temple and there was no mistake in the survey records and although the plaintiffs had knowledge of the survey proceedings, the plaintiffs did not stake any claim in respect of the suit property at the relevant time. The defendant denied that the plaintiffs had approached them at any time to issue no objection certificate for correction of the survey records in as much as the Committee had no powers to issue such no objection as the property was shown as an asset of the temple in the bye-laws published in the Gazette. According to the defendant, except for the house and the cattle shed belonging to the plaintiff, the entire suit property was in physical possession of the defendant's Committee and the plaintiffs were not in possession of the same, as claimed by them.

6. The learned trial Court by its judgment/decree dated 28.9.1988, in King Solomon's way gave the temple of Sri Sateri to the defendant and the suit property to the plaintiffs, declaring them as owners of the suit property, further directing the correction of Land Revenue Records. The learned trial Court,

observed, with reference to Form No. I & XIV, that although the suit property belonged to the plaintiffs, they had allowed the defendant–Devasthan to carry out the construction of the temple and manage the same, when in fact it was not the case of the plaintiffs that the said temple was constructed by the defendant-Devasthan with the permission of the plaintiffs and when in fact the plaintiffs had failed to prove their claim that the temple of Sri Sateri was constructed by the ancestors of the plaintiffs. In fact the learned trial Court even did not venture to find out as to how the defendant-Devasthan could have a temple belonging to them in the suit property allegedly belonging to the plaintiffs when it was not the case of the plaintiffs that the said temple of Sri Sateri was constructed by the defendant-Devasthan with the permission of the plaintiffs.

7. The defendant-Devasthan having preferred an appeal before the District Court, being Reg. Civil Appeal No.56/98, the learned Additional District Judge by judgment dated 15.7.2000 came to the conclusion that the trial Court could not have decreed the suit of the plaintiffs for declaration since the plaintiffs had miserably failed to establish their title to the suit property, assuming that the possession was established. The

learned Additional District Judge also noted that the Deed of Partition, on which the plaintiffs had based their claim for title, was an unilateral action and by no stretch could confer title on the plaintiffs particularly when in the case at hand no document was produced by the plaintiffs to show how the property came to their ancestors, namely Nango Gopal Gaudo.

8. This Court vide order dated 24.11.2000 admitted this second appeal on three substantial questions of law and it has been submitted by Shri Rao, the learned Counsel on behalf of the defendant-Devasthan that question (i) does not arise at all since it has been answered by a decision of Full Bench of this Court in the case of **Shrikrishna Nimaji and others v. Namdeo Bapuji and another (AIR 1963 Bombay 163)**.

9. Be that as it may, the learned First Appellate Court has dismissed the suit of the plaintiffs basically because the plaintiffs had failed to prove title to the suit property and that the Partition Deed-Exh.Pw.1/D was an unilateral document and could not have created title in favour of the plaintiffs. It can be seen from the said Deed dated 21.1.1916 that it was styled as 'a Deed of Partition and Allotment of Assets' and the recitals in the

said Deed show that Nango Gopal Gaudo and his wife Sita had three properties, third being the suit property and three sons by names Gopal, Shankar and Krishna and that the said Nango Gopal Gaudo had left behind the said three properties and the said three sons. The third property was described as “Deulacodil Sorvo Gorbatulem Gaudo” with a dwelling house existing therein. The said Deed states that since Nango Gopal Gaudo and his wife Sita had died without making any Will, in order to avoid between them disputes and misunderstandings, the present Deed was drawn for partitioning the assets into three equal parts and each part was allotted alongwith the said dwelling house to the parties of the first part namely Gopal, the party of the second part namely, Shankar and the party of the third part Krishna. In other words, all the three sons of the said Nango Gopal Gaudo allotted unto themselves one third share of the said three properties including the suit property 'Deulacodil Sorvo Gorbatulem Gaudo'. The title of the plaintiffs to the suit property was exclusively based on the said Deed of Partition. As per Shri Usgaonkar, the learned Counsel on behalf of the plaintiffs, the said Deed was not only of partition but also succession as well in that the three sons of Nango Gopal Gaudo succeeded to the suit property by virtue of the said Deed. To

highlight the concept of partition, Shri Usgaonkar has placed reliance on the case of **M/s. Kalooram Govindram v. Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara (AIR 1966 S.C. 4)** wherein the Apex Court has stated that partitioning is the ascertainment of individual shares and it can be brought about by an unambiguous declaration of their intention to divide i.e. by a conscious alteration of their status. Such a declaration brings about a division in status ... The next step is the division by metes and bounds whereunder separate properties are allotted towards the said definite shares of the individuals. The Apex Court has further observed that the division by metes and bounds by which separate properties are allotted towards the said definite shares of the individuals confer on a divided member an absolute title to a specified property, whereas before the partition he had only some interest in the entire joint family property and that in one sense his interest in the property of the larger joint family has become crystallized into a specific property and in substance he acquires a title to a specific property. On the other hand, Shri Rao, the learned Counsel on behalf of the defendant has submitted that the Partition Deed per se could not confer any title on the plaintiffs unless the plaintiffs had proved that the said Nango

Gopal Gaudo had himself title to the property and in this context Shri Rao has placed reliance on the case of **Karnataka Board of Wakf v. Government of India and others ((2004) 10 S.C.C. 779)** wherein the Apex Court has stated that a plaintiff filing a title suit should be very clear about the origin of title over the property and he must specifically plead it. Shri Rao has also referred to the case of **Ram Das v. Salim Ahmed and another ((1998) 9 S.C.C. 719)** wherein the Apex Court has observed that a weakness in the defendant's title to the suit property cannot establish the plaintiff's title. In that case, the plaintiff had filed a suit for declaration claiming title to the property based on a Will executed by Bandi Jaan and the Court held that the title to the suit property could not be declared in favour of the plaintiff unless the title of the executor of the Will was fully established.

10. In the case at hand, although the sons of Nango Gopal Gaudo executed the Deed dated 21.1.1916 purporting it to be a “Deed of Partition and Allotment of Assets”, no assets were partitioned and all that the three sons of said Nango Gopal Gaudo did by executing the said Deed is that they merely declared that the said three properties belonged to Nango Gopal Gaudo and allotted one third each of the said properties unto

themselves including one third of the house existing in the suit property . In fact, one fails to understand as to why there was a need to execute the said Deed dated 21.1.1916 when even in law the said three sons would have been entitled to the said one-third share in each of the said three properties in case the said three properties belonged to their said father/mother, the said Nango Gopal Gaudo and his wife Sita. Partition contemplates division of real or personal property which is in common into individual ownership of interests of each. In other words, the joint owners divide the property which is in common, among them in severalty. Nothing of this sort was done by virtue of the said Deed dated 21.1.1916.

11. In the case of Shrikrishna Nimaji and others (supra), a learned Full Bench of this Court, relying upon the decision of the Privy Council in Girja Bai v. Sadashiv Dhundiraj (AIR 1916 PC 104) observed that a partition does not give a title or create a title in a person, it only enables the person to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. The Privy Council in the above said decision had quoted with approval Sarkar's translation of a passage in Viromitrodaya by

Mitra Misra which was as follows:

> "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of propriety right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares."

Therefore, this Court held that partition does not give the person, to whom a land is allotted, any new title or create a title in him to that land. In the words of the Privy Council, partition only enables him to obtain in a definite and specific form the land, which was his own, it cannot be said that he has acquired that land.

12. The plaintiff (Pw.1) Shankar Gaude admitted in his cross-examination that he had signed a rejoinder in Civil Misc. Application No.10.94 filed in the suit and that he knew the contents of the same as they were read over to him and he had signed the same. He confirmed that the contents were true and correct and further admitted that he had stated in his rejoinder that he had traced the title documents and which were in

favour of his grandfather Nango Gaudo and had applied for certified copy which was not received by them and that the same would be produced immediately on its receipt. Ultimately the plaintiffs did not produce any document to support the title of the said Nango Gopal Gaudo to the suit property prior to the so-called Deed of Partition, and, the learned First Appellate Court has drawn an adverse inference against the plaintiffs for the non-production of the said title document in favour of the said Nango Gopal Gaudo. Shri Usgaonkar, the learned Counsel on behalf of the plaintiffs has tried to explain that at the time when the rejoinder in Civil Misc. Application No.10/94 was filed, what was available with the plaintiffs was only the document of inscription/description and not the original Deed of Partition and what the plaintiffs had undertaken in the said rejoinder is to produce the said Deed of Partition. That does not appear to be the import of what has been recorded in the cross-examination of the said Pw.1/Shankar Gaude. The said Pw.1/Shankar Gaude had clearly admitted that in his rejoinder he had applied for the title document of his grandfather, the said Nango Gopal Gaudo and that the same would be produced immediately on its receipt. One certainly could proceed with the assumption that the plaintiffs made an effort to trace the title of Nango Gopal Gaudo and found that he had none. In any event, in my view, adverse inference was rightly drawn against the plaintiffs for non-production of the title document in favour of the great grandfather of the

plaintiffs, the said Nango Gopal Gaudo. If a Deed of Partition can convey no title much less can a Deed of mere unilateral declaration of title convey a title on the persons who make such a declaration. As already stated, the plaintiffs' grandfather Shankar and his two other brothers namely, Gopal and Krishna did not partition any of the said three properties as such but merely by virtue of the said Deed declared that their father, the said Nango Gopal Gaudo had a right to the disputed property and proceed to allot one-third to each of them. Such a Deed, in my view could not have created or conveyed any title in favour of the said three sons of Nango Gopal Gaudo namely, Shankar, Gopal and Krishna and therefore, the plaintiffs, unless the plaintiffs were in a position to show that the said Nango Gopal Gaudo had a title in his favour. The plaintiffs' claim only based on the so-called Deed of Partition had to be rejected. The said three sons of Nango Gopal Gaudo namely, Shankar, Gopal and Krishna merely declared that their said father had a right to the suit property and therefore proceeded to allot one-third to each of them. They might have as well included the Secretariat of this State and allotted the same in the manner done by them in respect of the suit property and that would not make the Secretariat as their property. Suffice it to say that the plaintiffs acquired no title to the suit property based on the said Deed dated 21.1.1916 as they had failed to prove that the so-called original owner according to them namely, their great grandfather Nango Gopal Gaudo had title to the same. In my view, the learned First Appellate

Court was fully justified in observing that the Deed of Partition was an unilateral document which could not convey any title to the plaintiffs. The plaintiffs, therefore, were not entitled for a declaration to the effect that they were the exclusive owners of the suit property surveyed under no.263/3.

13. Admittedly, the suit property surveyed under no.263/3 was surveyed in the name of the defendant - Devasthan. Shri Usgaonkar submits that in case the plaintiffs are unable to succeed in their prayer for declaration, then at least the prayer for permanent injunction in their favour be considered. The survey took place about the years 1972-73 and in Form No. I & XIV the name of Sri Devi Bhagwati has been recorded in the occupants column and the other rights column it is recorded that there is Sateri temple and a house and well belonging to Rama Shankar Gaude. The plaintiffs allowed that entry to remain undisturbed and unobjected for more than 20 years. In terms of Section 105 of the Land Revenue Code, the defendant-Devasthan is presumed to be in possession of the said property by virtue of the said entry in the occupants column of Form No. I & XIV. That presumption was certainly not weakened but in fact was strengthened by the evidence led on behalf of the defendant. The said presumption could not be displaced by the type of evidence the plaintiffs' witnesses gave in the suit. The plaintiffs' witnesses namely Pw.2/Baltazaar Fernandes and

Pw.3/Prabhakar Madkari did not even know what was the name of the suit property, as pleaded by the plaintiffs. If the plaintiffs-Pw.1/Shankar Gaude conceded that the temple of Sri Sateri was being maintained by the defendant-Devasthan by stating that there was an electric connection given to the temple which was an extension from the property of the Devasthan; by admitting that the plastering of the temple was done by Yeshwant Atmaram Naik who was a Mahajan of the temple; by stating that a marble stone was fixed on the temple by Yeshawant Atmaram Naik; by stating that Manohar Ladu Naik had fixed the doors of the temple in the year 1988; that Punavstapna of the idol was done in the year 1986 and at that time five kundas were put up in the suit property for the purpose of the said Punavstapna and all the expenses for the said religious function were made by the defendant - Devasthan thereby conceding that the said temple of Shri Sateri belonged to the defendant - Devasthan, the said witnesses namely Pw.2 Baltazaar stated that the said temple belonged to the plaintiffs and was owned by them and defendant had nothing to do with the same. Likewise Pw.3 Prabhakar Madkari had also stated that the management of Sateri Devasthan was done by plaintiff no.1. Suffice it to say that the evidence of the said two witnesses of the plaintiffs was insufficient to displace the presumption of possession. On the contrary, the defendant had produced other evidence to show that the suit property was auctioned and proceedings of the said auction were produced at Exh. Dw.1/C and not only

that the Lease Deed renewed by the father of Pw.1 Shankar Gaude was produced at Exh. Dw.1/G and payment of rent at Exh.Dw.1/E. The defendant had also produced the payment of Rs.196/- for the year 1972-73 made to the plaintiffs' father, the said Rama Gaude towards performing puja in the temple of Sri Sateri. Dw.1 had categorically stated that apart from the suit property, the other properties belonging to the temple were not put in auction to sell the produce because they were being looked after by the servants of the temple and the plaintiffs had not explained whether the said proceedings of auction or the Lease Deed or the payment made related to any other property of the defendant - Devasthan. This evidence produced by the defendant only strengthened the presumption which the defendant had in their favour by virtue of the name of the Devasthan being recorded in the occupants column of Form No. I & XIV. The plaintiffs also led no evidence whatsoever that there was any incident as pleaded by them on 30.3.1994. That being the position, the plaintiffs could not have succeeded even in a suit for injunction simplicter on the assumption that they were in possession of the suit property. In fact, the plaintiffs had failed to prove their title as well as their possession in respect of the suit property and in this view of the matter the plaintiffs' suit certainly deserved to be dismissed.

14. The substantial questions of law shall stand answered

accordingly. There is no merit in this second appeal and consequently the same is hereby dismissed.

**N. A. BRITTO,J**

/vpf.